No. 2424.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TACOMA RAILWAY AND POWER COMPANY, a corporation,
Plaintiff in Error,

vs.

ELLING REMMEM,
Defendant in Error.

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Brief of Defendant in Error

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PRESS OF PUYALLUP VALLEY TRIBUNE

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STATEMENT

In this cause, Elling Remmem, the defendant in error, complained of the Tacoma Railway & Power Company, plaintiff in error, and alleged the cor-

porate existence of the plaintiff in error, and that it was at the times herein alleged engaged in operating a system of street railway in the City of Tacoma, and that defendant in error was at the time a resident of the City of Tacoma; and that on or about December 7th, 1912, at about 6 P. M. of said day, the defendant in error was traveling southward on South Yakima Avenue in the City of Tacoma, and upon arriving at South Sixty-second Street, undertook to cross from the westerly to the easterly side of said avenue, and that while defendant in error was upon South Yakima Avenue and in the exercise of due care on his own part and endeavoring to pass from the westerly to the easterly side thereof, one of the street cars of the plaintiff in error, which was being carelessly and negligently operated in a northerly direction on said avenue, was so carelessly and negligently operated and handled by the employes of the plaintiff in error in charge of the operation of said car that plaintiff was without warning run down, struck and injured by said car. The third paragraph of his complaint alleges the nature of the injuries. The fourth the age of the plaintiff and his earning capacity. The fifth that by reason of the injuries his earning capacity has been cut off and destroyed; and sixth his damages sustained in the sum of ten thousand dollars.

To this complaint an answer was interposed admitting that on December 7th, 1912, plaintiff undertook to cross South Yakima Avenue, was injured by colliding with one of the defendant's street cars,

but denies all the other allegations in paragraph two of the complaint. In paragraph three of the answer it is admitted that defendant in error sustained certain injuries. But all other allegations of paragraph three of the complaint are denied.

An affirmative defense was interposed alleging that the accident admitted to have occurred was occasioned by reason of the careless and negligent conduct of the plaintiff himself, and not otherwise.

To this affirmative defense the defendant in error replied denying the same. Issue was thus joined and the cause tried to a jury, and resulted in the verdict and judgment complained of by the plaintiff in error.

ARGUMENT

The first assignment of error is without merit for the following reasons:

The defendant company was guilty of negligence as shown by the testimony in that the motorman in charge of the street car was operating the same upon the streets of the City of Tacoma without keeping any look out ahead and for a considerable distance while looking back into the car and not looking at all in the direction in which his car was traveling.

See testimony of John E. Timmerman, page 32, Transcript of Record, where he says: "As we hit 64th Street I looked out of the car at the front end, the doors were still working themselves open, and

I noticed the motorman looking back inside of the car over his shoulder, and I looked at him steadily from that time on until I happened to see into the distance a man standing there, as I thought, at the side of the track. I could see this man standing there as I thought he was all the while the motorman was looking back, in fact, I was looking at him, and this fellow was almost in line with me. I supposed he was out of harm's way and thought nothing of it, and I thought I felt the impact of something hitting the car at the same time the motorman turned around and snapped off his power and stopped the car."

Page 33, Transcript of Record. "I did not hear a whistle at any time, and could see a bright head light ahead. I was looking at the motorman."

Also testimony of Mrs. John E. Timmerman, page 35, Transcript of Record, where she says: "I boarded the car with my husband, John E. Timmerman. After the car left 64th Street the motorman was looking back into the car all the while until it felt like he hit something, and he then stopped."

See also testimony of Oren Polley, page 31, Transcript of Record, where he says: "As the car passed I seen the motorman rubbering back at his conductor in the back end. He had his doors open."

He also testified, page 29, Transcript of Record: "I heard a sound and there was this other car coming and he was just about in the center of the track then, and they did not blow a whistle or give a signal

that there was a car coming, and it struck him beafore he got a chance to get off. Struck him with the corner of the car."

We respectfully submit that there was therefore the testimony of three absolutely disinterested witnesses to the gross negligence of the defendant company. Negligence in two respects: First, that the motorman was negligent in that he was looking back into the car and not ahead in the direction in which his car was running while operating the same upon the streets of the City of Tacoma; and second, that the motorman was negligent in not seeing the plaintiff upon the track in a place of danger, and giving some kind of a warning to him of the approach of the car. Which testimony abundantly justified the jury, if they believed it, in finding that the defendant company was, at the time of the accident, guilty of negligence.

We further respectfully submit that the allegation of contributory negligence on the part of the defendant in error was not conclusively established by the evidence, but that on the contrary the evidence does fairly establish the fact that the defendant in error was at the time in the exercise of ordinary care on his own part. He was attempting to cross from the westerly side of South Yakima Avenue to the easterly side of the same at a point much used by pedestrians as a crossing and immediately under the rays of an arc street light.

He testified, page 24, Transcript of Record,

"About the time I crossed 61st Street I seen a light that seemed like it was swinging on to the left, striking to the left. I judged it to be on the Alki switch. They call it 65th Street switch on Yakima Avenue. I thought the light was a car going down town going into the switch. I got a little further and a car came along at a good speed and passed me going from town, the same direction I was going. Just a little after she passed me I was about in the center of the block, I heard a blast of the whistle. I thought that a car was coming behind, a tripper, as I knew by the time of night, it was. I thought it was a signal to the car that swung first onto the switch for her to stop and wait until that tripper came up. I walked down until I got to a place where the sidewalk stops, at the place I marked "X" on the photograph, I started to walk across the street to the left as I could not go further on the sidewalk and there was an orchard and a fence in front of me; as I started to cross the street I thought I heard something. I was satisfied that I heard the car coming from the direction of town going south. At that time I was off the end of the sidewalk out in the street. I kept on walking and looked around to see if I could see the headlight of the car. I thought I seen a headlight and other lights, but I tried to get my eyes turned on it, fastened upon the headlight of the street car, and I did not see anything so close to me that I thought there was danger, so I straightened up again and about that time I was on the street car

track, and as I glanced ahead I saw a very short distance from me a street car, and I thought I could make it, and I tried to jump like this, illustrating, and at the same time she struck me and rolled me over, and I landed on my arms underneath. I looked southward all the time I was walking on the sidewalk and saw no street car up to the time that I started to turn out acress the street. There was a street light at the place I turned to go across and a path at that point."

That there was a tripper following the south bound car referred to by the defendant in error and which should have passed the car which injured the plaintiff at the Alki switch, is shown by the testimony of other witnesses.

See testimony of Oren Polley, page 29, Transcript of Record, who testifies in substance that he had been waiting at 64th Street to take a car into the City of Tacoma; that none coming along he had started to walk down to 61st Street to take the car instead of standing and waiting, as it was a wet, cold evening, and that as he was about at 63d Street one of the cars passed him going south toward Fern Hill. That as he had seen the north bound car take the switch at 65th Street or Alki switch, he thought he would have to run to get to 61st Street by the time the car caught up with him. He says, "I was going to run as I thought I would have time to catch it, and then I see this car coming. It was coming from 56th Street and Yakima Avenue. I was watching it over at 56th Street. I thought the trip-

per was coming to follow in the Alki switch. I was watching for these fellows. There was one car went up and there was another tripper at 56th Street, and I supposed it was going to pass it at Alki switch, and therefore I had plenty of time to get it. I expected both cars coming from town were going to pass at Alki switch."

Page 30, Transcript of Record, "In the meantime I seen this gentleman who was hurt coming on the other side of the street right opposite from me, and as he crossed came towards the track. I heard a sound and there was this other car coming, and he was just about the center of the track then, and they did not blow a whistle or give a signal that the car was coming and it struck him before he got a chance to get off, struck him with the corner of the car."

It will thus be seen that Mr. Polley interpreted the movement of the company's cars at the time of the accident exactly as Remmem interpreted them, and believed that the north bound car intended to wait on the Alki switch until the tripper following the south bound car had passed. And that this tripper had approached to the immediate vicinity of the accident at the time the accident occurred, is shown by the testimony of Mr. Timmermann, page 33, Transcript of Record, where he says: "I did not hear a whistle at any time. I could see a bright headlight ahead." This was a single track line, and we respectfully submit that the north bound car that ran down the defendant in error should have

waited at Alki switch until the south bound tripper passed the switch. As Remmem testifies he heard the tripper coming from the city, looked for it, saw the headlight and saw that it was not close enough to hurt. Polley was watching this tripper coming from 56th Street. Timmermann saw a bright headlight ahead at the time Remmem was struck.

It would thus appear that the plaintiff in error was running two of its cars in opposite directions on a single track into head on collision in the immediate vicinity of the place where they ran down the defendant in error, and that this was in fact true is shown by the significant absence of evidence to explain or contradict the same, as not one word of testimony in this regard was introduced upon the trial by the plaintiff in error.

In view of these facts and the undisputed testimony in this case, we respectfully submit that the defendant in error when he undertook to cross over from the west side of Yakima Avenue and the street car track of the plaintiff in error, did just what any prudent and careful man would have done under the circumstances. In view of the fact, as he testifies, "I looked southward all the time I was walking on the sidewalk and saw no street car up to the time I started to turn out across the street." The distance he had to travel is shown by Exhibit—to be about 24 feet before he would be safely across the street car track, and as he turned out his attention was diverted by hearing the tripper coming from toward town, and his time was occupied in looking

for it to see how closely it was upon him, until he had reached the street car track when the north bound car was immediately in front of him, and he jumped but was struck by the corner of the car.

Under the circumstances of this cause defendant in error would have been guilty of negligence had he not done exactly what he did do in attempting to cross this street car track. He had seen the north bound car take the 65th Street or Alki switch. He saw the south bound car pass him, run down to the switch, and heard it give a short blast of the whistle, which he understood to mean that a tripper was following in the block and that the north bound car should wait at the switch for the tripper to pass. He was looking in a southerly direction toward Alki switch as he walked and saw no car leaving the switch. He turned out to cross the street. As he turned out he heard the tripper coming from the north, he looked to see if it was close enough to hurt him. He saw the headlight and that he would have time to make it across the track ahead of it. He was under no obligation to look for a car coming from the south for the reason that the tripper bound south on this single track tied that car to the Alki switch by the strongest tie known in the operation of railways, namely, the duty of the company not to run their passenger carrying cars into head on collision. As was well said by Judge Rogers of the Second Circuit in the case of *New York Lubricating Oil Company vs. Pusey*, 211 Federal, page 622, at page 626:

> "But it is necessary in this connection not to overlook the general rule that every person has a right to presume that every other person will perform his duty, and that, in the absence of reasonable ground to think otherwise, it is not negligence for one to assume that he is not exposed to danger which can can come to him only from violation of the duty which the other owed to him. Failure to anticipate the defendant's negligence does not amount to contributory negligence."

Sustaining the rule thus announced by the citation of many authorities.

Furthermore, the question of whether or not the defendant in error was, in crossing the street as shown by the testimony, in the exercise of ordinary care is always a question for the jury. To quote from the language of Judge Rogers in the case above cited:

> "As the law does not require that the plaintiff should have exercised more than such care as ordinarily prudent persons would have exercised under similar circumstances to avoid danger, and as he was only required to exercise that degree of care which could reasonably be expected from one in his situation, we discover no error in the court's submitting the question to the jury. There are few questions within the whole range of judicial inquiry which are regarded as more

peculiarly and exclusively within the province of a jury than those of negligence. As said by the New York Court of Appeals:

'The wisdom of the time-honored rule of the common law which refers questions of fact to the jurors, and questions of law to the judge, is not more conspicuous in any class of civil cases, than in those which involve questions of negligence.' "

And the Supreme Court of the United States in *Railroad vs. Stout*, 17 Wall. 657, 664, says:

"It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

Judge Gray of the Third Circuit, speaking in the

case of *Bush vs Hunt*, 209 Federal, at page 171, says:

> "It is unnecessary to prolong this discussion of the testimony as it is apparent that, in order to have complied with the defendant's motion for peremptory instructions on account of contributory negligence, it would have been necessary for the court to have established in its own mind a standard by which to test the alleged negligence of the plaintiff. The real standard being what an ordinarily prudent man would have done under the circumstances, it could only be fixed by the jury, and the court properly submitted the fixing of that standard to its determination."

Grand Trunk R. Co. vs. Ives, 144 U. S. 408, 36 L. Ed 485 at p. 493.

In passing upon the question of negligence, and contributory negligence, it is an axiom of the law that each case must be judged according to its particular facts, circumstances and surroundings, and as well stated in the note to *Pilmer vs. Boise Traction Company*, 15 L. R. A. New Series, at page 259:

> "The precise thing which a person should do before attempting to cross the tracks of an electric railway is that which any prudent man would do under the particular circumstances; and the question as to whether un-

> der the facts of the given case the plaintiff is guilty of contributory negligence, is for the jury."

Sustaining this rule by the citation of very numerous authorities, several from the Supreme Court of Washington. Among them *Chisholm vs. Seattle Electric Company*, 27th Washington, 237; the facts of which were as follows:

> "The testimony of appellant is to the effect that when he left the sidewalk to cross the street he looked for cars, and saw two going south, one nearly opposite him, and one a block away, and did not see any going north. He then proceeded across the street at an ordinary gait, when he was struck by a car going north and run over by said car, which crushed his leg, necessitating amputation. We cannot understand upon what theory the court took the case from the jury, unless upon the theory that it is negligence as a matter of law for a pedestrian to fail to look and listen when he crosses a street car track. But this court has uniformly held that the rule which in that respect applies to steam railroads does not apply to street cars. The rule was again confirmed in a case recently decided by this court: *Burian vs. Seattle Electric Company*, 26th Washington, 606, and on the law announced in that case the judgment in this case will have to be reversed

> and the question of negligence under the circumstances submitted to the jury. We have often announced the rule that where circumstances are shown from which different conclusions could be reached by reasonable men, the question of negligence is always one for the jury, and that the judge usurps the function of the jury and commits error when he substitutes his judgment for the judgment of the jury."

This rule announced in the Chisholm case has become the fixed rule in the State of Washington.

We would call particular attention to the case of *Richmond vs. Tacoma Railway & Power Company*, 67th Washington, page 444, where the rule in the Chisholm case is re-affirmed over the strenuous objection of counsel for the plaintiff in error in this case, and where the court says:

> "The great weight of authority is to the effect that before a court will be justified in taking from the jury the question of contributory negligence the acts done must be so palpably negligent that there can be no two opinions concerning them."

See also *Blair vs. Seattle Electric Company*, 67th Washington at page 471, quoting the Richmond case and affirming the rule.

See also *Richardson vs. Spokane*, 67 W 621, where the Richmond case is again cited and the rule affirmed.

Also *Merwin vs. Northern Pacific Railway Company*, 68th Washington, at page 622, where the Richmond case is again cited and the rule affirmed.

Also *Hillebrant vs. Manz*, 71st Washington, at page 257, where the Richmond case is again cited and the rule again affirmed.

Williams vs. Spokane, 73d Washington, at page 242, citing the Richmond case and affirming the rule.

Lamoon vs. Smith Cement Brick Company, 74th Washington, page 164.

Masso vs. Stanton Company, 75th Washington, page 220.

Union Investment Company, vs. Rosenzweig, 37th Washington Decision, 89, at pages 91-92, where Judge Fullerton says:

> "In other words before an affirmative defense can be withdrawn from the jury and determined as a matter of law, the evidence must be clear and convincing and of such a nature that reasonable minds can draw but one conclusion therefrom."

Citing *Richmond vs. Tacoma Railway & Power Company*, 67th Washington, 444 (Supra.)

Also *Williams vs. City of Spokane*, 31st Washington Decision, page 185, citing and affirming the Richmond case at page 188.

Also *Beeman vs. Puget Sound Traction, Light & Power Company*, 37th Washington Decision, at page 209, where the Richmond case is again cited.

We desire to call particular attention to the Richmond case as it is in this case that the Supreme Court of Washington explains and modifies their holding somewhat to the contrary in the previous cases of *Skinner vs. Tacoma Railway & Power Company*, 46th Washington, 122; *Hellisen vs. Seattle Electric Company*, 56th Washington, 278; and *Fluhart vs. Seattle Electric Company*, 65th Washington, 291. Upon the strength of which counsel for defendant in error argued their motion for a new trial before Judge Cushman in the District Court; and upon which doubtless strongly rely in this court.

This rule of the Washington Supreme Court is in exact harmony with the rule prevailing in the Federal Courts for which no further citation is required than the comprehensive opinion of Justice Lamar in the case of *Grand Trunk Railway Company vs. Ives*, 144 U. S. 408 to 434, Book 36, Law ed., 485.

Under the rule prevailing in the State of Washington the company would be liable to the plaintiff in this case regardless of the plaintiff's negligence. Under the doctrine of the last clear chance; as it was clearly shown that plaintiff was looking northward for the purpose of locating the tripper bound south as he approached the street car track; he was seen by a passenger in the car which injured him, in the immediate vicinity of the track, while the car was yet over a hundred feet away, and had the motorman in charge of this car been keeping a lookout as required he would have discovered and appre-

ciated plaintiff's dangerous position in time to have avoided injuring him.

Masso vs Stanton, 75th Washington, 220, at page 228, where Ellis, Judge, says:

"A second situation to which the rule applies is this: where the person in control of such agency, by keeping a reasonably careful lookout commensurate with the dangerous character of the agency and the nature of the locality, could have discovered and appreciated the traveler's perilous situation in time, by the exercise of reasonable care, to avoid injuring him, and injury results from the failure to keep such lookout, and to exercise such care, then the last chance rule applies, regardless of the traveler's prior negligence, whenever that negligence has terminated or culminated in a situation of peril from which the exercise of ordinary care on his part would not thereafter extricate him. This last phase of the rule applies whenever injury results from new negligence or from a continuance of the operator's negligence after that of the traveler has so ceased or culminated."

Grand Trunk R. Co. vs. Ives (Supra.)

The second, third and fourth assignments of error are fully answered by the argument in regard to the first assignment.

The fifth assignment of error is without merit as there is no evidence in the record to justify the instruction requested, nor does the instruction requested lay down a correct abstract rule of law. The evidence showed that the defendant in error did not see the north bound car which ran him down until he was upon the track and the car immediately upon him. Transcript Record, page 25. And the evidence shows that he thought the danger to be apprehended was from the tripper coming from the north, and that there was no danger to be apprehended from the car on Alki switch for the reason that it would have to remain there until the tripper got by, and that there could be no danger from this source because the company would not, on this single track, run two cars into head on collision.

The sixth assignment of error is without merit as the instruction therein requested was given in substance by the court no less than five times. The court charged the jury:

> "Also, it is the duty of the plaintiff to exercise the care that an ordinarily careful and prudent person would for his own safety under the circumstances and surroundings at this time. As I have before defined to you, negligence is want of ordinary care, and ordinary care is that care that an ordinarily careful and prudent person would exercise under like circumstances, and should be proportioned to the peril and danger reasonably

apprehended from a want of proper prudence." T. R. 53.

"You will also take into consideration all the circumstnces shown by the evidence whether the plaintiff exercised ordinary care, and among these would be the fact of his crossing the street car track, for the plaintiff was bound to make such use of his faculties, his eyes and his ears, and to conduct himself in the manner that an ordinarily careful and prudent person would before he can recover anything, even if the defendant was negligent, and the very fact that a street car track is dangerous, and if a man does not use his faculties, his eyes and his ears, his liability to be brought into danger is one of the circumstances you are to take into consideration in determining whether he made such use of his faculties as an ordinarily careful and prudent person would at the time of the injury and prior thereto." T. R. 54.

"Before the plaintiff could recover in this suit I think I have already made it plain, but I will repeat it—before he can recover in this suit, he must not have contributed in any way to the happening of the accident by his own negligence or want of ordinary care." T. R. 54-5.

"It is the pedestrian's duty, before stepping on the car track, to make reasonable use of his senses for his own safety to ascer-

tain whether or not a car is approaching, and he does not do so, and that failure on his part contributes to his injury, he cannot recover, even though those operating the car were also negligent, or to state this proposition in another way, I instruct you that if you find that both the plaintiff and the motorman in charge of the car were negligent, and that as a result of such point or concurrent negligence, that is the negligence of both parties concurrently contributed to the injury and an accident occurred, your verdict should be for the defendant." T. R. 57.

"Where the plaintiff himself so far contributes to the accident by his own negligence or want of ordinary care and caution on his part the accident would not have happened, the plaintiff cannot recover, and your verdict must be for the defendant.

You are further instructed that it was the duty of the plaintiff to use his senses, his eyes, and ears, to discover the proximity and passage of the car of the defendant company, and his failure to use his faculties as an ordinarily careful and prudent person would do under such circumstances, would constitute contributory negligence and would prevent any recovery by him." T. R. 58.

It will hardly be held that the trial judge is required to repeat and reiterate in his charge to the jury the same thing in as many different varieties

of language as the ingenuity of counsel for the defendant can devise. We feel that the trial judge was exceedingly kind to plaintiff in error when he charged the substance of their requested instruction five distinct times, and we do not think they should be so unkind as to complain of his conduct to this honorable Court when he refused to charge the same thing the sixth time.

Grand Trunk R. Co. vs. Ives, (Supra.)
New York L. E. & W. R. Co. vs. Winters, 143 U. S. 60, Law ed. B. 36, pp. 71-80.

We therefore respectfully submit that the record discloses no error of which the plaintiff in error can justly complain and that the judgment appealed from should be affirmed.

We further submit that the record discloses nothing which would justify the appeal of this cause, and that it is apparent that it was appealed solely for delay, and we therefore ask that the penalty provided by Rule No. 30 of this honorable Court of ten per cent. upon the amount of the judgment in addition to interest be awarded.

Respectfully submitted,

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